

Performers' Rights and Evolution of Performance in Nigeria

Dorcas A. Odunaike¹

School of Law and Security Studies Babcock University, Ilishan Remo, Ogun State, Nigeria

Abstract

Performers' right in musical performance, dramatic performance, reading or recitation of literary act or any similar presentation has been given international recognition in many international treaties. Sections 26 – 30 of the Nigerian Copyright Act, 2004 domesticate this right when it vest on performers' the exclusive right to control their live performances amongst others. The aim of this article is to examine the evolution of performance and performers' rights in Nigeria, appraise the basic provisions of the Copyright Act on performers' rights and highlight the gaps in the law with the view of proffering recommendations for legal reform.

Keywords: performer, performance, musical, dramatic and literary.

1. Introduction

Intellectual property law is very wide. The Convention Establishing the World Intellectual Property Organization (WIPO) defines "intellectual property" as including the rights relating to literary, artistic and scientific works, performances of performing artist, phonograms and broadcasts, inventions in all fields of human endeavor, scientific discoveries, industrial designs, trademarks, service marks, commercial names and designations, protection against unfair competition and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields². These legal concepts deal with the protection of the fruits of man's creative efforts³.

Performances of performing artist such as singers, musicians and actors constitute a genre of intellectual property rights that has been offered legal protection internationally and nationally over the years. Performers devote their lives to the creation and interpretation of literary works through performances; they are an integral part of the creative process⁴. Thus, performers have rights based on copyright and related rights legislation.

There is a marked distinction between 'performance' and the 'rights of a performer' in the same vein the evolution of each differs. While the evolution of performance in Nigeria dates back to pre-literary days in traditional societies long before the modern form of dramatic and musical performance; performers rights has its origin in the legal regime of performance.

This article traces the evolution of performance in Nigeria from the historical perspective spanning the pre-colonial, colonial and post colonial period and concludes with an examination of the basic provisions of the Copyright Act on performers' rights highlighting the lacuna in the law and proffers recommendation that will enhance the effectiveness of the law.

2.0 The Pre-colonial Period

Recorded history places the period between the 16th and 18th centuries as the pre-colonial period of the geographical area which later became known as Nigeria⁵. There was no political entity by the name Nigeria within that period, but each of the ethnic societies that eventually amalgamated into what has come to be known as present day Nigeria could have fallen under what has been described by Olauda Equiano as "almost a nation of dancers, musicians and poets"⁶.

The evolution of performance in the old Western part of Nigeria has been traced to the *Alarinjo* theatre. Hugh Clapperton and Richard Lander gave the first account of *Alarinjo*, the traditional Yoruba Travelling Theatre in the Old Oyo Empire as far back as the 15th century⁷.

¹ LL.B,B.L, LL.M, M.Phil, Ph.D (OAU), Senior Lecturer, Department of Private and Commercial Law.

² Convention Establishing World Intellectual Property Organization, 1970 available on line at www.wipo.int/treaties/en/conventions/trtdocs_wo027.html accessed 12/3/2013.

³ Intellectual property has been divided into two broad categories recently, namely industrial property and copyright. Industrial property includes patent for invention, trade mark, industrial designs and geographical indications while copyright covers literary, musical, artistic works and architectural designs. Culled from - What is intellectual property? *WIPO Publication, 450* available on-line at www.wipo.org accessed 9/7/15 at 4.59am.

⁴ Interpretation of literary work through performances brings to life the message of an author in a clearer and more comprehensive manner.

⁵ History of Nigeria, Wikipedia, the free encyclopedia available on-line at [www.en.wikipedia.org/wiki/history_of_nigeria\(1500-1800\)](http://www.en.wikipedia.org/wiki/history_of_nigeria(1500-1800)) accessed 3/4/15 at 4.41pm.

⁶ Olauda Equiano (1799) cited in Julius-Adeoye, 'Rantimi Jay*The Drama of Ahmed Yerima: Studies in Nigerian Theatre*, 2013, p. 3 available on-line at <https://openaccessleidenuniv.nl/bitstream/handle/1887/20858/01/pdf> retrieved on 4/4/15 at 10.32pm

⁷ Ojuade Jeleel Olasunkanmi, The Secularization of Bata Dance in Nigeria, *Nigerian Theatre Journal* Vol.7(1), 2002 at p. 55.

Citing Clapperton, Adedeji claims that “the *Alarinjo*¹ theatre emerged from the *egungun* masquerade as ancestor worship during the reign of Alafin Ogbolu who ascended to the throne at Oyo Igboho about 1590, as a court entertainment”².

Whereas, the origin of the *Alarinjo* theatre cannot be accurately dated but it is certain to have developed out of dramatic narration of actual events such as hunting or fictional events such as folk tales. Although generation of dance-dramatists called ‘*oje*’ pay homage to previous masters, there is no clear link between ‘*alarinjo*’ and ancestral masquerades which is tied to rituals and seasonal observances³. Adornment of masks by *alarinjo* is probably to enjoy anonymity and separate the actors on stage from the person after the stage⁴.

This is also the position among the Igbo where the ancestral masquerade comes out to adjudicate or to grace high-rituals only. The mask is adorned by elderly men only and it is believed that they come out from the ‘earth’. This is in contrast to dancing masquerade whose masks is adorned by vigorous and energetic young men. The story is similar amongst the Ibibio, Ijaw, Efik, Igala and Idoma.

From the aforementioned it can be seen that the origin of dramatic performance be it among the Igbo, Ibibio, Yoruba, and Idoma communities, just to mention a few, has been traced to festival that have some sort of performance. The *Egungun* masquerade⁵ in Yoruba land is accompanied with spectators watching and applauding the masquerades who dance, jump and perform feats that, it is believed, ordinary human being cannot perform.

Ekong masquerade⁶ of the Ibibios’ in the Eastern part of Nigeria; *Borgu* puppet show in the Northern part; the Hausa *Yankamanci* and the Tiv *Kwagh-hir* are other examples. Such performances are customarily presented in public places and wherever people congregated.

Performance in traditional Nigerian society is an amalgamation of the various genres - dramatic, musical or literary. By this it means that there is no strict delineation, in actual fact, all the genres happen during the various performances. For example, the dancing masquerade also sings and recites poetry or dances to poetries rendered by its choral group. The drummer talks with his stick on the talking drum and sometimes the spectators participate in its interpretations. Hence, in traditional societies authors and performers are usually the same person a poet, singer and/or storyteller.

There are other examples of traditional festivals where the dramatic re-enactment of a story or stories is central to it⁷. Sometimes the performance involves a tragic hero, a ritual effigy, a willing scapegoat or a carrier who loses his or her personality for the common good and benefit of all. The carrier engages in a dramatic conflict and a symbolic struggle with spiritual forces with the aim of peaceful resolution for the common good of all. Such dramatic journey usually terminates at the evil forest, the sea or the crossroads as the case may be⁸. It is worthy of note that this dramatic journeys are interwoven with songs, drumming and dance.

For instance in Ile-Ife, the *Edi* festival is a combination of ritual, dramatic, musical and literary performance⁹. It is usually a seven day event, “a re-enactment of Moremi’s singular heroic deed in offering her only son Oluorogbo as sacrifice in the emancipation of the people of Ile-Ife from the Igbo warriors”¹⁰.

The festival as narrated by Gabriel Adewole¹¹ commenced with the *Oluware* dancers who emerged from their compound dressed in palm fronds garment and wrestled with the *Ooni*¹² who floors their leader symbolizing their defeat of the Igbo warriors by the Ife people.

This is followed by the ‘*Omolarere*’ the enactment of the death of a certain prince who was mistakenly sacrificed during the Moremi era when the Ife people were looking for a spiritual solution to their problem. The mother of the prince was told that her son had become a deity, subsequently an image was carved and placed on

¹ A Yoruba word which connotes someone who dances as he/she moves along the road.

² Olapeju Shuaib, *Costume and Make-Up as Indispensable Arts in Theatre Practice: A Historical Survey*, p.140, 2009, available on-line at www.ajol.info/index.php/cajts/viewfile/76628/67075 retrieved 4/4/15 at 11.16pm.

³ As opined by Gabriel Adewole of Yekere Compound Ile-Ife, a historian and teacher of great repute.

⁴ Ibid.

⁵ Traditionally costumed figure otherwise known as ancestral spirit believed to have come from the land of the dead with good tidings to visit the living.

⁶ Stewart gives its picturesque description as a traditional dance costume with a table-like structure fastened to the head, covered with brightly coloured fringed handkerchiefs and on top appears the head of a female goddess carved in a soft wood and painted with white or pink with little mirrors as decorative base. Hands and feet of dancers are carefully covered and a colourful cloth is worn around the waist, cited in Olapeju Shuaib op.cit. at p. 137.

⁷ Yemi Ogunbiyi *Drama and Theatre in Nigeria: A critical Sourcebook* Pitman Press for Nigerian Magazine, (1981) at p. 8.

⁸ Nwadike, Charles Emeka, (1999-2000), *The Anthropology of Theatre Performance in Nigeria, An Overview*, published in *The Performer*, Ilorin Journal of the Performing Arts, Vol.1. No.2, 1999, Vol.2. No. 1, 2000 at p.97.S

⁹ Olapeju Shuaib, op.cit. at p. 136.

¹⁰ Ibid.

¹¹ Of Yekere Compound, Ile-Ife, who for several years have participated in this heroic festival.

¹² ‘Ooni’ is an abbreviation of the word ‘Oonirisa’ the traditional title of the King of Ile-Ife in Osun State, a city notable as the source of the Yoruba tribe in Nigeria.

a horse for the mother to see in procession.

Today a miniature image is carried to *Igbo-Ilamoja* to symbolize this event. The ‘*ina osan*’ long torches lit, to indicate the fire that was used to burn the Igbo warriors and the cleansing of evil by fire, is a significant event in this festival.

After this event is the *ere lulu*, which is more like a mass ritual procession during which time the people enjoy a period of release. Restrictions in speech are removed. Obscene songs and choruses are allowed, men sings freely about women sex parts while women retort in like manners.

The bearing of the *eru-omu* (load of fern) by *Tele* is the ultimate cleansing procession. The carrier of the *omu* load bears on his person the sins, evil and afflictions of the people over the outgoing year. As he is passing through Ife town, standby people will dump on him further ills and misfortune which he bears beyond the city wall to dump and returns only in the deep night. It is believed that whoever sees him on his way back or while he is yet to have his bath upon his return will not last seven days. This festival signifies a dramatic re-enactment of the rites of spiritual cleansing experienced by the Ife people during the time of Moremi thereby continuously cleansing the town of all forms of ills and ward off bad omen.

Musical performance is an integral part of the culture of Nigerians. During the pre-colonial era musical performance is a regular feature in Oba’s palace to entertain special guest and the chiefs. In traditional culture, solo music abound especially in ceremonial functions. For instance, amongst the Yoruba’s the *akigbe oba*¹ is a praise singer of the king using ancestral lineage to move the king to act in appropriate cases.

Historical record of musicians in the courts of Oba of Benin dates back to 1651². Musical performance in ethnic communities usually occurred spontaneously or in response to worship chants during religious and social engagements (such as naming or marriage ceremony), initiation and burial ceremonies. Sometimes talented individuals simply raise the songs; at times designated families or groups notable for songs will entertain members of the societies in songs³.

Such musical performance was mass-oriented and communally owned⁴. The use of music could be seen in every facet of life and the place of musical performance among the Yoruba’s, Igbo, Ibibio’s, just to mention a few, is very important.

Another form of performance in traditional Nigerian society is performance in literary works. This is usually in form of storytelling or folktales. Storytelling as an integral part of human social life and existence dates back to time immemorial. In Nigeria it is linked with the history, culture, social organization, enlightenment and education of the people⁵. The storyteller also uses songs and at times drama re-enactment to narrate his/her story.

In a typical Nigerian society, a story teller is a poet, a singer, an entertainer, a griot as well as a custodian of the culture and genealogy of the people. At times storytelling performance in Nigeria is executed through the use of a puppet or marionettes. An example of this can be found among the *Kwagh-hir* theatre among the Tiv people of Nigeria⁶.

Solo unaccompanied chanting is a form of performed arts popular in the Western part of Nigeria among the Yoruba and in the East among the Igbo; *ekun iyawo* (the brides lamentation), among the Yoruba, developed from the tearful renditions of the fears and apprehensions of the young bride as she is severing herself from the family of birth to enter into matrimony. Tearfully, the bride bids farewell to her people requesting their prayers while rendering her ancestral panegyric to encourage herself and prove her nobility.

The *oriki*⁷ of the Yoruba or *ima mbem* of Igbo is also solo chanting rendered by traditional poets who construct their poems spontaneously as they sing. In this kind of singing it is the wordings and the construction and twists of words that are important not the melody or quality of voice⁸.

¹ A Yoruba word which literally mean - someone who sound the praise of the king.

² Ryder, A.F.C *Benin and the European, 1485-1987* cited in Tunji Vidal, *From Traditional Antiquity to Contemporary Modernism: A Multilateral Development of Music in Nigeria Music and Social Dynamics in Nigeria*, an article published in Bode Omojola (ed.) *Music and Social Dynamics in Nigeria*, a Publication of the Department of Performing Arts, University of Ilorin, (1997) p. 114.

³ Dr. Olabode Omojola *Music Education in Nigeria: Historical Trends*, (1992) page 2, available online at <http://www.unilorin.edu.ng/journals/education/ije/dec1992/MUSIC%20EDUCATION%20IN%20NIGERIA.pdf> accessed 4/4/15 at 10.40pm.

⁴ This means nobody can really lay claim to the songs because they are either derived from some previous ones or the tune is retained while the words change to suite the occasion.

⁵ Ibid at p. 100.

⁶ A theatrical group that uses puppets or masquerades to illustrate a story punctuated by songs and choral responses.

⁷ A form of praise singing using ancestral lineage.

⁸ Joy Nwosu-Lobamijoko, *Art Singing in Nigeria: The Composers and The Performers*, an article published in *African Art, Music in Nigeria, Fela Sowande Memorial*, Edited by M.A Omibiyi-Obadike, Sterling-Horden Publishers Nigeria Limited, (2001) p 71.

2.1 Colonial period: 1900 to 1960

The geographical area now known as Nigeria had been in contact with European and Arabic way of life through the Europeans and Arabs who visited Africa in the name of trade, exploration and pilgrimage. Such foreign contacts have had influence on how musical and dramatic performance is done. The percussion of music and tempo of dance has been modified, especially in the North by Arab/Touareg music. The sailors in the bights of Benin and Biafra brought West Indian and Portuguese percussion (which eventually developed into Juju music).

Today's Nigeria is an amalgamation of various administrative units of Britain in and around the period of the 'Scramble for and partitioning of Africa'¹. It is dated between 1881 and 1914² when the Treaty of Surrender of Lagos to the British Crown was signed by Oba Dosunmu, but there were various spheres of interest – Oil Rivers Protectorates, Colony of Lagos, Egba Kingdom; South Eastern Protectorate; Northern Protectorate etc which all became one in 1914, under Lord Lugard whose wife coined the name Nigeria from Niger-area. This marked the period when Nigeria came under the British colonial rule³.

The advent of colonialism brought with it Christianity. Whereas Islam which had come before it had been acculturated and had not negatively affected performing arts; however, Christianity discouraged most traditional performed arts. Hence, the birth of dramatic performance in the modern sense of it began in the 19th century when the top cream of Lagos elite got together and opened 'The Academy' a social and cultural centre for public enlightenment and the promotion of arts, science and culture⁴.

From 1902⁵, various groups organized concerts at 'The Academy' the content of these performances were based on English music, prominent of which were love songs, solos, glees, carol, comic sketches amongst others. Dramatic performance became prominent and on 22nd April 1904 a play written by D.A Oloyede titled *King Elejigbo and Princess Abeje of Kotangora* was performed publicly at the Glover Memorial Hall⁶.

Between 1904 and 1920 more of such plays were written and staged. The dawn of World War 1 and political interests made the Lagos elite to lose interest in theatrical performance for some time, and the lull persisted until early 40's when Chief Hubert Ogunde came on the scene⁷.

Chief Hubert Ogunde was a policeman and a choir member in his church as well as a dramatist. He commenced his theatre career with the production of his first play '*Garden of Eden*', and '*The Throne of God*' commissioned in Lagos by the Cherubim and Seraphim Society in aid of the church building fund⁸. The success of these plays made him to go professional when he established the Ogunde Theatre - the first contemporary professional theatre group.

His inauguration of 'African Music Research Party' in 1946 marked the advent of modern professional theatre in Nigeria⁹. Thereafter he staged '*Tigers Empire*', '*Darkness and Light*', '*Mr. Devil's Money*'. He delved into political social satire with huge successes when he staged his plays '*Yoruba Ronu*', and '*Otito Koro*'¹⁰.

Ogunde reached the peak of a brilliant career with the production of celluloid movies such as '*Jaiyesimi*', '*Ayanmo*' and '*Aiye*' just to mention a few. He later led the Nigerian National Troupe for so many years. His role in the development of theatre in Nigeria made many to refer to him as the 'Doyen of Nigerian theatre'.

The evolution of modern form of musical performances necessarily cannot be divorced from the rich culture of traditional music among the various ethnic groups in Nigeria. The emergence of a group of Nigerians with western cultural values in the 18th century resulted in the evolution of classical music, notable amongst them are Robert Arunbamole Coker and Hubert Macaulay¹¹, with this came the evolution of church music.

Highlife music, a genre very popular in Nigeria and Ghana developed and made waves with great performers' like E.T Mensah, Bobby Benson, Rex Lawson and Roy Chicago, each band spiced by the leader's traditional musical background and preference. For instance Roy Chicago brought in the Yoruba Iya-Ilu in to

¹ This is the popular name for the invasion, occupation, colonization and annexation of African territory by European powers during the period of New Imperialism, available on line at <http://en.m.wikipedia.org/scramble-for-aafrica> accessed 5/4/15 at 4.27pm.

² Different writers gave different dates hence the assumption that it is between 1881 and the period of amalgamation of Nigeria in 1914.

³ Culled from, Agwu Ukiwe Okali, *Nigeria: A Post Centenary Proposal*, Daily Sun Newspaper dated 13th March 2014, available on line at www.sunnewsonline.com accessed 17/9/15 at 11.09pm.

⁴ Quoted by J.A Adedeji in '*The Church and the Emergence of the Nigerian Theatre 1866-1914*' cited in Yemi Ogunbiyi, *Drama and Theatre in Nigeria: A Critical Sourcebook*, Pitman Press for Nigerian Magazine, (1981) at p. 17.

⁵ Ibid at p. 19.

⁶ Ibid.

⁷ Ibid.

⁸ Boldwin Anughara, *Hubert Ogunde, Father of Yoruba Theatre*, Newswatch Times of 17th July 2013 available on-line at <http://www.mynewswatchtimesng.com/hubert-ogunde-father-of-yoruba-theatre> retrieved 4/4/2015 at 11.51pm.

⁹ Ibid.

¹⁰ Ibid

¹¹ Notable for his use of folk songs with the melodramatic society.

accompany the trumpets and saxophone.

British Schools in the 19th century also helped to fashion developments in performing arts. School bands (mostly taking after military or police bands) proliferated interest in music (West influenced music as well as drama and other arts). For instance, Lagos Grammar School in 1872 had an entertainment society while Church Missionary Society (CMS) Female Institute founded in 1872 also organized concert from time to time under the leadership of Robert Coker the music teacher¹.

The first music programme in a Nigerian University was pioneered by University of Nigeria Nsukka in 1960 when Fela Sowande School of Music was formed (later re-named the Department of music)².

The struggle for independence in the 50's also helped to further advance the development of performing arts. Singers sang about freedom even as they extolled the British monarch. Patriotism was expressed, national issues were sung about and Pan-Africanism was also celebrated³.

2.2 Post-colonial Period: 1960 till date

Following independence on 1st October 1960, the euphoria of independence and oil boom brought with it an explosion of creativity and entertainment in the urban areas. Thus some relatively new artists like Duro-Ladipo, Kola-Ogunmola, Moses Olaiya, Oyin-Adejobi started or expanded the activities of their own theatre groups.

Duro Ladipo a Nigerian dramatist became famous for Yoruba historical plays, the crown of which was *Oba Koso* (The King did not hang) which was based on the legend of Sango, an early history king in Oyo empire. He also created spectacular dramatizing themes from Yoruba mythology and history of old Oyo Empire through plays like *Oba Moro* (Ghost-Catcher King) and in 1964 he introduced *Oba Waja* (The King is Dead)⁴.

Kola Ogunmola another brilliant and creative actor specialized in comedies such as *Ife Owo*, *Omuti Apa* (an adaptation of Amos Tutuola's 'Palmwine Drunkard'). Others are Adeyemi Afolayan (a.k.a Ade Love), Ishola Ogunsola (a.k.a I-sho Pepper) and Lere Paimo just to mention a few⁵.

Contemporary Nigerian theatre began with Wole Soyinka in 1960 when he founded 'The 1960 Mask'. Subsequently he produced the following plays, *Trials of Brother Jero* (1960) *Lion and the Jewel* (1963) *Orisun* (1963); *Kongi Harvest* (1965) amongst others. Soyinka also wrote and directed *The Dance of the Forests* a rather prophetic satire for the Nigerian Independence.⁶

Ola Rotimi founded the Ori Olokun Theatre Company in 1968 and it revolutionized theatre production in the tertiary institutions. The Ori-Olokun theatre was an African Theatre group rendering its performances in English Language. Its epic plays include 'Ovonramen N'ogbaisi', 'The Gods' are not to Blame', 'Kurunmi' and 'Rere Run'.⁷

The broadcasting industry has also contributed in no small measure to performance arts. From radio theatres of the 60's (notable of which was 'Alao-shaky shaky') to early television series such as 'Village Headmaster', and later soap operas such as 'Cock Crow at Dawn', 'Mirror in the Sun', 'Samanja', 'Koko Close', 'Behing the Clouds', 'New Masquerade' just to mention a few, came the first set of Nigerian screen stars. The actors and actresses that feature in these soap operas are the nucleus that formed the present Nollywood in the early 90's⁸.

Today, Nollywood has produced some of the world's highly influential celebrity such as Omotola Jalade-Ekeinde and Genevieve. Hence, Richard Corliss opined that "the world's most productive English-Language film industry is not Hollywood but Nollywood".⁹

As in any traditional society, the performing arts were not covered under any codified law so that originators of any work (dramatic, literary or musical performance) could enjoy the monopoly of credit for such work. The nearest to such was when a singer acknowledges the seniority of older or earlier performers before singing tunes that originated through them. This is known as 'Iba' among the Yoruba.

Usually where a song belonging to another singer was reproduced, the person reproducing it would most likely precede his/her own song with the prefix "orin mi ko, orin baba/egbon/ore mi ni" (this is not my

¹ Bode Omojola op. cit . at 117.

² Ibid.

³ As opined by Gabriel Adewole, fn.9.

⁴ Duro Ladipo, Biography, Encyclopedia Britannica available on-line at <http://www.britannica.com/ebchecked/topic/327515/duro-ladipo> accessed 4/4/15 at 11.55pm.

⁵ Kola Ogunmola-Wikipedia, available on-line at http://en.wikipedia.org/wiki/kola_ogunmola accessed 29/6/15 at 9.53pm.

⁶ Wole Soyinka-wikipedia available on-line at http://en.wikipedia.org/wiki/wole_soyinka, accessed 4/4/15 at 11.50pm.

⁷ Ola Rotimi, Nigerian Scholar and Dramatist, available on line at www.britannica.com/biography/ola-rotimi accessed 29/6/15 at 9.48pm.

⁸ Frank Nweke's Opening Speech at Nigerian Entertainment Conference, 29th April 2013 available on line at www.thenet.ng/2013/04/read-frank-nweke-jnr-s-opening-speech-at-the-nigerian-entertainment-conference accessed 13/4/15 at 12.04am.

⁹ Ibid.

song, it is the song of my father or senior or friend). Even where this was not done, there was no avenue for redress then for the original composer, however, every self-respecting singer would respect this convention, especially among professional artistes¹.

Moreover, by the early 60s Nigeria has not acceded to Universal Copyright Convention of 1952. The era of modern form of performance, marked the on-set of the legal regime of performers rights in Nigeria.

3. Evolution of Performers' Rights in Nigeria

As noted above, performers' legal rights in performances evolved with modern form of performances. No legal regime was required for protection of musical and dramatic performances between the 17th and 18th Century. This was due to the fact that the nature of performance in traditional Nigerian society was transitory and the main purpose was public entertainment without more.

From records, Nigeria deposited its instrument of accession to the Universal Copyright Convention on 14th November 1961 and it came into force on 14th February, 1962. But this still did not protect the interest of the performing artist in any manner as the Universal Copyright Convention of 1952 did not provide for legal protection of performances.

Thereafter, Nigeria acceded to the International Convention for the Protection of Performers, Producers of Phonogram and Broadcasting Organizations, 1961 (otherwise referred to as the "Rome Convention, 1961"), on October 29, 1993. This accounts for why the 1970 Copyright Act in Nigeria did not follow the evolutionary developments of Copyright Law in England but straightforwardly provides for legal protection of copyright only without legislating on neighbouring rights.

The Copyright Act of 1988² however provides for the legal protection of live performances of performers' thus for the first time the legal protection of performers rights was established in a separate form as distinct from copyright under Part 1. The 1988 Copyright Act marks the dawn of the legal regime of performer's rights in Nigeria

4. Appraisal of Basic Provisions of Sections 28-30 on Performers' Rights

Under the Nigerian law, the rights given to performers under Section 26 of the Copyright Act is 'right to control' as distinct from 'right to do or authorize the doing of...' given to author under Section 6. 'Right to control' flows from ownership, although in appropriate cases it also flows from possession³.

According to Salmond⁴, "ownership denotes the relation between a person and any right vested in him/her". He opined that ownership is opposed to possession⁵, although possession may in appropriate cases be presumed evidence of ownership⁶. In law there are circumstances in which the possessor of a thing is presumed the owner of it⁷. Ownership on the other hand is also transferred through possession. Possession is so important that in appropriate cases it confer a good title on its holder although the holder has no good title himself⁸.

Given the above school of thought in jurisprudence, control' is distinct from 'authorization', therefore it is important to place a performer on same level as author by conferring on performers the right to authorize the doing of the acts listed under Section 26 of the Act⁹.

However, the performer's right to control the use of his performance is also very apposite with respect to the usage of his performance, condition of usage, distribution rights, amongst others.

Furthermore, performers have exclusive 'right to authorize'¹⁰ in relation to their live performance the performing, recording, broadcasting live, reproduction in any material form and adaptation of the performance. These are the economic rights of a performer hence it is my opinion that performers rights as provided under the Nigerian law comprise mainly of economic rights.

Economic rights as the name implies is the right of the author of work to financial reward from the use

¹ Giving honour to whom honour is due is a form of acknowledgement prevalent in all genres of music. With time this became the norm and hardly can any performer sing without acknowledging his/her predecessor in the same genre of music.

² As amended in 1992 and 1999, now contained in Cap. C28 Laws of the Federation of Nigeria, 2004.

³ Salmond, John W. *Jurisprudence*, Rallantyne Press, London, (1913) p. 220

⁴ Ibid, p. 236.

⁵ One may possess a right without owning it for instance a wrongful occupier may have a right of way, or own a right without possessing it, an example is the case of Landlord and tenant.

⁶ For example, long possession of land is deemed sufficient title to property which originally belonged to another.

⁷ Ibid, p.239.

⁸ In sale of goods, a seller in possession without good title passes good title to an innocent buyer without notice.

⁹ By the provisions of Section 26 of the Nigeria Copyright Act, a performer shall have the exclusive right to control the performing, recording, broadcasting, reproducing in any material form, and adaptation of his/her performance.

¹⁰ Right to authorize embedded in Section 28 of the Act is an indication that in appropriate cases a performer/producer has same right as an author whereas the 'right to control' in Section 26 is an indication that in other situation (such as where the performer is not the same person producing his/her work) the law confer on such a performer the possibility of preventing.

of his work. According to Morgan Owen¹, there are two basic economic rights from which flow others; they are (i) the right of making available and (ii) the right of reproduction.

Reproduction right is well enshrined under the Nigerian law, the right to authorize or prohibit the recording or making of copies of his/her live performance is otherwise known as 'reproduction right'².

Also the right of a performer to authorize or prohibit the sale, offering for sale or hiring of a recording of live performances is called 'rental and lending right'. The provisions of section 28(g) which prohibits anyone from offering for sale or distributing a recording of a performers' live performance is called 'distribution right'.

In addition, Section 26(1)(a) of the Act expressly conferred on performers' the 'exclusive right to control' in relation to his performance the performing, recording, broadcasting live; reproduction in any material form; and adaptation of the performance.

It is worthy of note that the performers' property right is protected by the Act whether the performer is alive or dead. In *Experience Hendrix LLC v Purple Haze Records Limited*³ the performances of a performer (a famous singer and guitarist) was recorded by the respondent before his death. The respondent claimed that it owned the rights in those performances and sought summary judgment for infringement of those rights, he claimed that the provisions of the Act removed from protection performances by performers who had died before the Act came into force and that Section 180 of the Copyright Patent and Designs Act, 1988 did not confer rights on a performer's personal representatives. The Court held that on its proper construction the Copyright Designs and Patents Act 1988 protected the economic interests of performers and their estates, whether the performers were alive or had died before the Act came into force.

While it can be said that the Nigerian law has ample provisions on performers' property rights, the Act is silent on the right of separate individuals connected with a performance especially where an aspect of a performer's property right is owned by more than one person jointly. Whereas the right of separate individuals connected with a performance has been given judicial recognition by the court (in line with international standards) in so many cases.

For instance in *Bourne and others v Davis*⁴ the claimant who has been a member of a group of four musicians that recorded an informal performance of a set of songs issued proceedings on the basis of infringement of his performers property right to prevent individual members of the group (though they had ceased to perform as a group) from assigning their right in the performance without the consent of the other. It was held that a member of a group of musicians had individual performer's property rights in their group performances and any infringement of those rights without his/her consent or the consent of any assignee was prohibited. It is therefore expedient to include this right in the Nigerian legislation.

While the Nigerian Copyright Act provides for moral right in respect of authors rights under Section 12 of the Act, there is no corresponding provision under Part II of the Act relating to neighbouring rights. Whereas a moral right regime inaugurates a new status for performers by recognizing that performers must also be in a position to oppose/forbid the deformation of their presentation which could damage their reputation and professional standing⁵.

Since a performance is an extension of the performer's personality and a part of his property, a moral right regime for performers will be apposite in recognition of their creative activities, with the lacuna in the Nigerian law it is highly recommended that moral rights be provided under Part II of the Copyright Act.

Right to remuneration is a class of right that is not provided for under the Nigerian law in respect of performer's right whereas in other jurisdictions (in Europe for instance) two rights on equitable remuneration for performers are provided by the Rental and Related Rights Directive⁶ - namely 'right to claim equitable remuneration with regard to communication to the public of sound recording and the public performance of sound recordings (but not films)⁷. The other is 'right to equitable remuneration' when the performer transfers his rental right in a film or sound recording to another person⁸.

It is worthy of note that Section 9 (2) of the Copyright Act⁹ provides that the *owner of a musical work*¹⁰ incorporated in a cinematograph film (that is broadcast to the public) shall be entitled to receive fair

¹ Morgan Owen, (2002) *International Protection of Performers' Rights*, Hart Publishing Portland.

² Section 28, *ibid*.

³ (2007) F.S.R 31.

⁴ (2006) All E.R 160.

⁵ Joseph Straus, (2010) *Neighbouring Rights, National and International Developments*, Chapter 4, *International Encyclopaedia of Comparative Law*, Vol. XIV p. 5.

⁶ Council Directive 92/100/EC of November 19, 1992.

⁷ S.182D, Copyright Designs and Patents Act, 1988.

⁸ S. 191 F-H, Copyright Designs and Patents Act, 1988.

⁹ Cap. C28, Laws of the Federation of Nigeria, 2004.

¹⁰ Emphasis mine.

compensation¹ from the broadcasting authority. The phrase ‘owner of musical work’ implies the producer of such work as distinct from the performer.

The Act is however silent on the right of performers in a cinematograph film that is broadcast to the public. Although, paragraph 5 of the Third Schedule to the Act provides that where a record comprises of a performance or a musical work, or an adaptation of a musical work, the conditions specified in paragraph 1 of the Schedule (to the effect that the copyright in a work is not infringed by a person who makes recording of the work or an adaptation thereof if record or adaptation of the work have been made in or imported into Nigeria for the purposes of retail sale; or the record producer gave notice to the owner before making the recording among others) are fulfilled in relation to such copyright.

In addition, it is only in respect of authors of graphic works that the law provides for rights to share in proceeds of sale under Section 13 of the Act. Whereas technology has made a performance open to exploitation by a number of groups that are not party to contracts between a performer and a producer², hence the emergence of new technologies has made it difficult to control access to a performance especially the open-air performances. It is pertinent therefore to provide for a right to equitable remuneration especially in circumstances not envisaged by the performer and the producer when entering into contract.

The right of the performer to consent or give authorization in writing to a public performance of the whole or substantial part of the performance³ is otherwise known as right to public performance in other jurisdictions.

This right was given judicial approval as far back as 1917 by Justice Oliver Wendell Holmes in the case of *Herbert v Shanley Co*⁴ when he held that public performances of music contributes to the profit making ability of an establishment and therefore constitutes *a performance for profit that must be licensed even if no special admission was charged*⁵.

To this end, a provision that performers have the right to authorize public performance of their performance as well as broadcast of their performances without a corresponding right to equitable remuneration is like building a chair without a leg. Since public performance right is collectively administered by collecting society on behalf of performer, to wit the collection of royalties, the insertion of a right to equitable remuneration in this situation will go a long way in providing the required leg on which Section 28(c) and (d)⁶ can stand.

Furthermore Section 28 (a) and (b) gives credence to this proposal of a right of equitable remuneration for performers when it vests in the performer the right to prohibit recording of his/her live performance and the right to prohibit the broadcasting live of the whole or substantial part of the live performance; in the event of an infringement, a right to equitable remuneration will avail the performer in such a situation.

Also exploitation of performances by technology not developed or contemplated under a contract between a producer and a performer may result in a windfall of profit for the producer to which a performer may be entitled to equitable remuneration otherwise the performer is deprived of lifelong benefit which by law has been provided in other jurisdictions.

Article 12 of the Rome Convention of 1961 (to which Nigeria is a signatory) lend credence to this when it provides that “if a phonogram is published for commercial purposes or a reproduction of such phonogram is used directly for broadcasting or for any communication to the public, a single remuneration shall be paid by the user to the performers, or to the producers of the phonogram or to both⁷.”

The obligation imposed on Contracting States by Article 12 is reduced by the provisions of Article 16 (1) (a) to the effect that “any state may at any time, in a notification deposited with the Secretary-General of the United Nations, declare that as regards Article 12 it will not (i) apply the provisions of that Article; (ii) apply the provisions of that Article in respect of certain uses; (iii) as regards phonograms the producer of which is not a national of another Contracting States, it will not apply that Article; (iv) as regards phonograms the producer of which is a national of another Contracting States, it will limit the protection provided for by that Article to the extent to which, and to the term for which, the latter state grants protection to phonograms first fixed by a national of the State making the declaration...”

By the provisions of Article 12 stated above, a performer that is disadvantaged under its own national law cannot secure remuneration for secondary uses of their performances in another offending state. While there is ample provision in the Nigerian Copyright Act on collective administration of musical performances, the Act

¹ By Section 9(3) in the absence of an agreement on amount payable as compensation, the amount shall be determined by the Court.

² Morgan Owen, op.cit. at page 79.

³ Section 28(c) and (d)

⁴ 242 U.S 591(1917)

⁵ Emphasis mine.

⁶ Copyright Act, Cap. C28, Laws of the Federation of Nigeria, 2004.

⁷ Although the convention provides further that member states may, through domestic law, lay down the conditions as to the sharing of the remuneration.

is silent on collective administration of dramatic performances. This is a food for thought for law makers in Nigeria, if an international convention has made provision for payment of remuneration our law makers must not placed Nigerian performers at a disadvantaged position by not providing for it under her national law.

The importance of the inclusion of a right to equitable remuneration in respect of performer's rights in Nigeria cannot be overemphasized. Given the wealth of experience of producers (especially in contract negotiation) and the inexperience of new talents in the performing industry in contract negotiation, there is a form of imbalance that can be given the required equilibrium through the inclusion of right to equitable remuneration in the Nigerian law thereby enhancing effective protection under the law, to do otherwise is to further jeopardize the interest of performers in this respect.

Section 26(2) of the Copyright Act¹ expressly provides that copyright subsists in dramatic performance; musical performance; reading or recitation of a literary work; or any similar presentation which is or *so far as it is a live performance*² given by one or more individuals. Hence a person who knowingly and without the performers' consent made unauthorized recordings of his/her live performances commits bootlegging in contravention of the performers rights.

Although the Nigerian Act prohibits bootlegging, the Act did not confer any private right of action on either the performer or the record company in the event of an infringement whereas the general rule is that performance of a statutory obligation could only be enforced in the manner provided by statute, it is important that this lacuna in the Nigerian law be filled.

Part II of the Nigerian Copyright Act is also silent on transmission and assignments of performers rights whereas in other jurisdictions, performer has first ownership of his/her right as well as a private interest in his performance and can transfer his interest by assignment or testamentary disposition or by operation of law as movable property. He can also grant an exclusive license to do, in relation to his performance, any of the protected rights³.

Under the Nigerian Copyright Act, the rights conferred on the performer in relation to his performance subsist until the end of the period of fifty years "from the end of the year in which the performance first took place"⁴, whereas copyright in authors work subsists till 70 years after the end of the year in which the author dies⁵, this seeming imbalance between protection conferred on copyright and related rights should be foreclosed.

Section 28(a) of the Act provides that a performer's right is infringed by a person who without the consent of the performer or authorization in writing records the whole or substantial part of a live performance, provided that where the consent sought is to make a recording of the work for research, private or domestic use, such consent shall not be unreasonable refused.

By Section 28(b) it is an infringement to broadcast live the whole or any substantial part of a performance without consent or performs in public the whole or a substantial part of the performance. It is also an infringement to show or plays in public the whole or a substantial part of the performance for commercial purposes without consent⁶.

It is also an infringement to record, reproduce and distribute a live performance without the consent of the performer. In *Bourne and other v Davis*⁷ the claimant sought for an injunction to restrain the defendant from infringing the claimants' reproduction and distribution rights in their musical performance and the court gave summary judgments in favour of the claimant in this respect.

Another act of infringement may occur where a substantial part of a performance which is by means of recording is broadcasted or included in a cable programme⁸ without the consent of the performer.

By the provisions of the Act, whoever imports into the country otherwise than for his private or domestic use, recording of a performers' work which is an infringing recording, is in breach of statutory duty and liable on conviction to a fine or imprisonment⁹, hence only importation for commercial purposes is actionable¹⁰.

Where in the course of trade or business, a person sells or lets for hire, offers, distributes or displays for sale or hire a recording of a performers' work which is an infringing recording, an infringement has occurred¹¹. In any case of infringement, the causal connection need not be between the parties, the causal connection must

¹ Cap. C28 op.cit.

² Emphasis mine.

³ Ikechukwu Magnus Olueze *Nigerian Copyright Law*, Magna Press Limited, 1998, pg. 141.

⁴ Section 27, Copyright Act, Cap C28 Laws of the Federation, 2004

⁵ First Schedule of the Copyright Act, Cap. C28, Laws of the Federation of Nigeria, 2004.

⁶ S.28 (b)(c)(d) op. cit.

⁷ (2006) All E.R. 160.

⁸ Section 28(d) op.cit.

⁹ Section 28(e), op. cit.

¹⁰ Oyewunmi O. Adejoke (2015) *Nigerian Law of Intellectual Property*, University of Lagos Press, p. 125.

¹¹ Section 28(g) op. cit.

be between the respective works¹.

As a basic prerequisite to the above section, the performer's consent or authorization must be in writing². There is nothing therefore to support the imputation of such consent by implication or conduct. Such consent in writing need not necessarily be given by the performer under his hand. It is sufficient if it is given by his authorized agent – thus the application of the maxim *qui facit per alium facit per se*³ meaning a person who acts through another act himself.

The Nigerian Copyright Act provides for both civil and criminal remedies although argued to be inadequate as it has not deterred infringers. By the provision of section 30(1) any person who infringes a performer's right shall be liable on conviction to a fine:-

- (a) in the case of individual, a fine not exceeding ₦10,000
- (b) in the case of a body corporate, to a fine of ₦50,000
- (c) in all other cases, to a fine of ₦100 per copy dealt with in contravention or to imprisonment of twelve months or both.

Although there is dearth of litigation in respect of performers rights in Nigeria, which makes it difficult to cite instances where court imposed such penalties on infringers, recent judicial decision on optical disc piracy comes in handy in this respect.

In the case of *Nigerian Copyright Commission v Nworie Anayo*⁴ Justice Abdu-Kafarati in a judgement delivered on 12th March, 2012 sentenced the accused to both six months imprisonment and a fine of N100 for each of the infringing copies of foreign movies in DVD format found in his possession.

In the same vein the Federal High Court in Lafia in the case of *Nigerian Copyright Commission v Jonah Ogwu*⁵ convicted four persons of optical disc piracy bothering on possession of pirated films and sound recording.

The meager sum payable as fine is still considered too small as it has not serve as deterrent to offenders. Since infringement of rights of copyright owners is equated with the offence of stealing it is important for penalty for its infringement to be at par with the penalty prescribed for stealing under Section 390 of the Criminal Code⁶ which is imprisonment for three years without an option of fine. In the alternative the Copyright Act penalty section can be amended to increase the fine to N500,000 for an individual and N1,000,000 for body corporate⁷.

It is however important to point out that what the prosecution is required to establish under Section 29(1) and 30 of the Copyright Act is that the offender did the infringing act without the consent or authorization in writing of the performer and not necessarily to prove *scienter*⁸.

Nevertheless, the onus is on the alleged offender to lead *scienter* evidence to establish that he did not know that his conduct was an infringement of the performers' right. Furthermore, Section 29(2) empowers the Court to order that the unauthorized recording or any other part thereof be delivered to the performer.

5. Conclusion

In conclusion, this article examined the evolution of performance and performers' rights in Nigeria and culminates in an examination of the basic provisions of Sections 26-30 of the Nigerian Copyright Act on performers' rights. It found it inadequate in the sense that the Act did not provide for new forms of exploitation made possible by advance technology and the internet.

Furthermore the Act did not provide for legal protection of performers' of expressions of folklore, also the Act did not provide for moral rights of performers. In addition the provisions of the Copyright Act as it relates to performers have not been effectively implemented over the years, to this end suitable machinery and effective administrative procedures are of great importance. It is my recommendation that performers' should see Intellectual Property Right (IPR) as a personal right and for them to value their performance right from the beginning of production as to take steps to protect it legally.

Producers and marketers have identified corruption as a factor that has rendered the law on performers'

¹ Unreported Suit No FHC/L/26/89 *Muri Adejimi v 3C Promotions and Consultancy Limited & Another*.

² Section 28 op.cit.

³ *Gaumont British Distributors Ltd vs Henry* (1939) 2 K.B 711

⁴ Unreported suit no. FHC/ABJ/CR/10/2010.

⁵ Unreported suit-FHC/LF/CR/3/12.

⁶ Cap.C38, Laws of the Federation of Nigeria, 2004.

⁷ Afterall the U.S Code Title 18, 2319A provides for 5 years imprisonment in respect of first offenders and 10 years imprisonment in respect of a 2nd offender who infringe a performers' right by committing unauthorized fixation and trafficking of sound recording and music video of live musical performances. The available fine can be as high as \$250,000 to deter infringers. See RIAA available online at www.riaa.com accessed 20/9/15 at 1.17am.

⁸ Latin word meaning "knowingly" i.e a degree of knowledge that makes a person legally responsible for the consequences of his/her act or omission, Bryan A. Garner, *Blacks Law Dictionary*, 8th Edition, West Publishing Coy, 2004, p. 1373.

rights ineffective in Nigeria. It is therefore recommended that corruption be tackled headlong to enhance an effective legal regime of performers' rights in Nigeria.

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